STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 15, 2013
v	No. 310534 St. Joseph Circuit Court
JESS ALLEN KNAPP, Defendant-Appellant.	LC No. 11-017489-FH

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Jess Knapp of larceny of property valued at $1,000 or more but less than $20,000. MCL 750.356(3)(a). Defendant's conviction is based on the theft of 400 pounds of metal fixtures from Graber Industries and the sale of those items to various scrap yards. At sentencing, the court ordered defendant to pay $3,115.40 in restitution, making the obligation joint and several with his partner in crime, Larry Himes.[1] Himes' testimony regarding defendant's role in the theft was sufficient standing alone to support defendant's conviction. And despite the lack of an evidentiary hearing, the record supports the specific restitution award. We affirm.

I. BACKGROUND

Himes testified that he and defendant stole 400 pounds of brass and copper fixtures from an enclosed semi-trailer on the property of Graber Industries. Himes claimed that the scheme was defendant's idea and that defendant drove him to Graber Industries. The men kicked out a part of the wooden fence enclosing Graber's property, broke into the trailer, removed metal items from their boxes (92 boxes in total), and carried the items off the property in large plastic buckets. Defendant insists that he was not present during the theft but admits that he drove Himes to various scrap yards the next day in exchange for $50 and a pack of cigarettes. A buyer at one scrap yard was suspicious because the men brought in such a large amount of new items. The buyer contacted the police and provided them with Himes' identification information,

[1] Himes pleaded guilty in a separate case and received a reduced sentence in exchange for his testimony against defendant.

information that Himes was required to provide at the time of sale. After Himes was arrested, he confessed to the theft and implicated defendant. Based on the inconsistent version of events, the court instructed the jury on the elements to convict defendant as a principal or as an aider and abettor. The jury convicted defendant as charged, but did not specify the theory on which it relied.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first asserts that there was insufficient evidence to support his larceny conviction. We review de novo challenges to the sufficiency of the evidence. In doing so, we must view both the evidence in the light most favorable to the prosecution. The prosecution presents sufficient evidence when a rational trier of fact could find "that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In conducting our review, we must not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses. *Id.* at 514-515. All conflicts in the evidence must be resolved in the prosecution's favor. *Id.* at 515.

The elements of larceny are (1) the taking of someone else's property without consent, (2) movement of the property, and (3) the specific intent to steal or permanently deprive the owner of the property. *People v Cain*, 238 Mich App 95, 120-121; 605 NW2d 28 (1999). MCL 750.356(3)(a) provides that a person is guilty of a felony if "[t]he property stolen has a value of $1,000.00 or more but less than $20,000.00." "Nonferrous metal," which includes brass and copper, is considered property under the statute. MCL 750.356(1)(g); MCL 445.423(f).

The record evidence, considered in the light most favorable to the prosecution, supports defendant's larceny conviction as a principal offender.[2] Himes testified that he and defendant removed metal from a semi-trailer that belonged to Graber Industries. The jury could base its verdict on that evidence standing alone. *People v Sullivan*, 97 Mich App 488, 492; 296 NW2d 81 (1980) (holding that a jury may convict a defendant based solely on the testimony of an accomplice).[3] Defendant also made inculpatory statements to the police, however. When asked why he became involved in the theft, defendant told an investigating officer that the officer had "never been in his shoes and he has to make a living also . . . . He has people he has to pay too and he has to do it somehow." The record evidence establishes that defendant specifically intended to permanently deprive Graber Industries of the metal as well. "An actor's intent may be inferred from all the facts and circumstances." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 1999 (1998). By selling the stolen goods within 24 hours of the theft, defendant

[2] As defendant's conviction as a principal offender is supportable by the record evidence, we need not consider the alternate theory that defendant acted only as an aider and abettor.

[3] Defendant argues that the evidence presented at trial cannot be deemed sufficient because Himes, the only witness connecting him to the actual larceny, was not credible. We may not interfere with the jury's credibility determination to overturn defendant's conviction. *Wolfe*, 440 Mich at 514-515.

effectively established that he did not intend to return the goods. Based on this evidence, the jury could determine defendant's guilt beyond a reasonable doubt.

III. RESTITUTION ORDER

Defendant challenges the amount of the restitution award. Defendant further claims that his trial counsel was ineffective for failing to request an evidentiary hearing to ascertain the stolen property's value and points to alleged evidentiary holes, the filling of which might have led to a reduction in the award.

We generally review a trial court's award of restitution for an abuse of discretion. As defendant failed to preserve this issue by objecting at sentencing, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Byard*, 265 Mich App 510, 511; 696 NW2d 783 (2005). Our review of an unpreserved ineffective assistance challenge is limited to mistakes apparent on the existing record. *People v Davis (On Rehearing)*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, defendant must show that: (1) counsel's performance was constitutionally deficient, and (2) "'but for counsel's error, the result of the proceeding would have been different.'" *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

MCL 780.677(3) governs the award of restitution when a "crime results in damage to or loss or destruction of property of a victim of the crime." Pursuant to the statute, a defendant is required to do the following to make restitution to the victim:

> (a) Return the property to the owner of the property or to a person designated by the owner.
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> (b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (*i*) or (*ii*), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
>
> (*i*) The fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.
>
> (*ii*) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.
>
> (c) Pay the costs of the seizure or impoundment, or both.

In the presentencing investigation report, Faythe Graber, the operator of Graber Industries, indicated that the value of the stolen metal fixtures was between $1,500 and $2,000. The report also indicates, however, that "[t]he victim provided documentation and is requesting

$3,115.40 restitution." Graber testified at trial that she "got back in the end" two "large boxes" of "copper fittings." She specifically indicated that she did not include that returned property in her itemized restitution request. An investigating officer testified that an unspecified amount of the stolen items were recovered from two scrap yards. Presumably, the recovered items are the property returned to Graber.

Despite defendant's assertion to the contrary, based on this record, it appears that the court complied with MCL 780.677(3)(b) by not including in the restitution award the value of those metal fixtures that were returned to the victim. Graber simply never included the value of the returned property in her restitution request. We cannot discern from this record whether the court valued the stolen property under subsection (b)(*i*) or (b)(*ii*). The court is required, however, to base its award on the "greater" figure. If the court actually had relied upon the wrong subdivision, any correction of the error would only lead to a *larger* restitution order. Defendant has established no ground supporting reconsideration of the award.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher